IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.575 of 1997
With
CRIMINAL APPEAL No.525 of 1997
With
CRIMINAL APPEAL No.526 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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MOHAMMED SALIM IBRAHIM QURESHI & ANR. - Appellants
Versus
STATE OF GUJARAT – Respondent.

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Appearance :

MR YOGESH S LAKHANI — Advocate for Appellants in Criminal Appeal No.575 of 1997 and for Respondents in Criminal Appeal Nos.525 of 1997 and 526 of 1997.

MR HM PRACHCHHAK — Additional Public Prosecutor for Respondent in Criminal Appeal No.575 of 1997 and Appellant in Criminal Appeal Nos.525 of 1997 and 526 of 1997.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE J.R.VORA

Date : 03-06/03/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Criminal Appeal No.575 of 1997 filed under Section 374(2) of the Code of Criminal Procedure, 1973 (“the Code” for short) is directed against judgment dated April 24, 1997 rendered by the learned Additional Sessions Judge, Court No.12, Ahmedabad, in Sessions Case No.140 of 1996 by which the two appellants, who were original accused Nos.1 and 2, have been convicted for commission of offences punishable under Section 302 read with Section 34 of the Indian Penal Code (“IPC” for short), and each sentenced to R.I. for life and fine of Rs.1,000/- (Rupees One Thousand Only), in default R.I. for three months, for gruesome murder of Ms.Geetaben Bachubhai Rambhiya, who was engaged in the activity of rescuing cattle, which were being sent to abattoir for illegal slaughtering.

Criminal Appeal No.525 of 1997 is filed by the State Government under Section 377 of the Code wherein prayer is made to impose death sentence on the appellants in Criminal Appeal No.575 of 1997 for causing diabolical ghastly murder of Ms.Geetaben Bachubhai Rambhiya in broad daylight near C.N.Vidyalaya, Ambawadi, Ahmedabad, on August 27, 1993.

Criminal Appeal No.526 of 1997 is filed by the State Government under Section 378 of the Code wherein acquittal of the appellants in Criminal Appeal No.575 of 1997 for commission of offence punishable under Section 135(1) of the Bombay Police Act, 1951 (“the Act” for short) is challenged.

As all the three appeals arise out of judgment dated April 24, 1997 rendered by the learned Additional Sessions Judge, Court No.12, Ahmedabad, in Sessions Case No.140 of 1996, this Court proposes to dispose them of by this common judgment.

2. The facts emerging from the record of the case are as under:

Ms.Geetaben Bachubhai Rambhiya @ Shah was residing at 1140, Zumpadi Ni Pole, Mandvi Ni Pole, Manek Chawk, Ahmedabad, with her husband Bachubhai Shah. She was engaged in the activity of rescuing animals, which were being sent to abattoir for illegal slaughtering. She was appointed as an Honorary Inspector by Shri Akhil Bhartiya Hinsa Nivaran Sangh. She was also appointed as a Cattle Welfare Officer by Animals' Welfare Board of India, Madras. On August 27, 1993, she was patrolling in Ahmedabad City with her colleagues namely, Kansara Rakesh and Ketan Arvindbhai Shah, with a view to stopping vehicles carrying cattle, which were being sent to abattoir. When she was near Kot-Ni-Rang, Sarangpur, Ahmedabad, a loading rickshaw bearing registration No.GTH-7705 was stopped by her. On checking the rickshaw, she found that six calves were being taken to abattoir for slaughtering. On interrogation of the driver, she learnt that the cattle belonged to the appellant No.1, i.e. Mohmed Salim Ibrahim

Kureshi. She took the loading rickshaw with cattle and driver to Astodia Police Station and lodged her complaint against the driver of the loading rickshaw, i.e. Rajubhai Shivabhai Raval, and another person, who was with Rajubhai, for commission of offences punishable under Sections 335(1) and 378 of the Bombay Provincial Municipal Corporations Act, 1949. After lodging of the complaint, the cattle, which were six in number, were handed over to Ms.Geetaben to be lodged at Panjarapole, Ahmedabad. Therefore, Ms.Geetaben requisitioned services of Gogaji Surajmal to carry the cattle from Astodia Police Station to Panjarapole, Ahmedabad. Accordingly, Gogaji Surajmal with his loading rickshaw went to Astodia Police Station and met Ms.Geetaben as well as one Hiteshbhai Patel, who was also working in Shri Akhil Bhartiya Hinsa Nivaran Sangh of which, Ms.Geetaben was Honorary Inspector. At Astodia Police Station, the cattle were placed in the loading rickshaw of Gogaji Surajmal. Gogaji Surajmal in the company of one policeman from Astodia Police Station proceeded towards Panjarapole, Ahmedabad whereas Ms.Geetaben and Hitesh Patel proceeded towards Panjarapole in another auto-rickshaw. On way to Panjarapole, the policeman, who was sharing the driver's seat, alighted near Town Hall. Therefore, Ms.Geetaben disengaged her rickshaw and occupied part of driver's seat of loading rickshaw of Gogaji whereas Hitesh Patel sat in the loading portion of the rickshaw. The loading rickshaw thereafter was taken to Panjarapole, Ahmedabad. At Panjarapole, Ms.Geetaben contacted

the concerned officer and left the six cattle to the care of Panjarapole. At the instance of Ms.Geetaben, Gogaji and Hitesh Patel took tea from a road side Tea-Stall. Thereafter, Gogaji drove his rickshaw towards C.N.Vidyalaya. At that time, Ms.Geetaben was siting by the side of driver whereas Hitesh was occupying the loading portion of the rickshaw. Before the rickshaw could reach bus stand located near C.N.Vidyalaya, a scooter on which the two persons were sitting, overtook the rickshaw. The scooter was stopped in front of the loading rickshaw and, therefore, driver Gogaji had no option, but to halt his loading rickshaw. The moment the rickshaw was halted, the appellant No.1, who was driving the scooter, left the scooter and rushed towards Ms.Geetaben with a pistol shaped big knife in his hand. On seeing this, Ms.Geetaben, who was occupying the part of the driver's seat, came out of the rickshaw and started running for her life. The appellant No.1 chased her and overtook her within no time. The appellant No.1 thereafter inflicted blows with knife on Ms.Geetaben. Meanwhile, the pillion rider also took out a knife lying in the dickey of the scooter and both the appellants started inflicting indiscriminate blows on Ms.Geetaben. It may be stated that the place where the incident took place is a busy thoroughfare. Meanwhile, Police Constable Radheshyam Chhotelal, who was serving at Chhadavad Police Chowky attached to Ellisbridge Police Station, was going for performing his patrolling duty near Kameshwar Flats at about 2.00 p.m. He

witnessed that the loading rickshaw was kept opposite the bus stand near C.N.Vidyalaya and a person was inflicting knife blows on a woman. Therefore, he rushed to the spot where the incident was taking place and challenged the person, who was inflicting the blows on Ms.Geetaben. The person, who was inflicting the blows made an attempt to escape on the scooter with another who was with him. However, Police Constable Radheshyam Chhotelal caught him by hair as a result of which, the appellant No.1 fell down and the appellant No.2 who was with the appellant No.1 started running towards Excise Chowky, Ambawadi. An attempt was made by the appellant No.1 to mount an assault on Police Constable Radheshyam, but on seeing the incident, one SRP Jawan rushed to the place in question and aimed his loaded rifle at the appellant No.1 asking him to raise his hands. The appellant No.1 had no option but to raise hands and after he had raised his hands, the bloodstained pistol shaped knife was taken away by Police Constable Radheshyam Chhotelal from him. Meanwhile Police Jamadar Jashuji Takhuji, who was present at Chhadavad Police Chowky which is quite near the place of incident, was informed by some one that one person had inflicted blows on a woman and was fleeing towards Ambawadi Excise Chowky. On learning this, Police Jamadar Jashuji Takhuji left the Police Chowky and started chasing the said person. He found that the person, who had made an attempt to flee, was caught by members of the public and was being beaten. He, therefore, caught the person and brought him

to Chhadavad Police Chowky. The person caught by Police Jamadar Jashuji Takhuji is the appellant No.2 in Criminal Appeal No.575 of 1997. When Police Jamadar Jashuji Takhuji brought the appellant No.2 in Criminal Appeal No.575 of 1997 to Chhadavad Police Chowky, he found that Police Constable Radheshyam was sitting in the chowky with the appellant No.1 in Criminal Appeal No.575 of 1997. Police Constable Radheshyam Chhotelal and Police Jamadar Jashuji Takhuji brought the appellants to Ellisbridge Police Station from Chhadavad Police Chowky. Meanwhile, injured Geetaben was removed to V.S.Hospital for treatment. At V.S.Hospital, CMO Dr.Rakesh N. Patel examined injured Geetaben and declared her as brought dead. Dr.Rakesh N. Patel, in turn, informed Jamadar Jethabhai, who was discharging duties at V.S.Hospital, that injured Geetaben was brought dead. Therefore, Jamadar Jethabhai conveyed the message to PSO Mr.Sabursinh of Ellisbridge Police Station that injured Geetaben, who was brought at the hospital for treatment was declared dead by the CMO of the hospital at 14.55 hours on August 27, 1993. The information received was conveyed by PSO to PI of the Police Station, who was at his residence and on the instructions of the PI, PSI Mr.Parmar of Ellisbridge Police Station went to V.S.Hospital, Ahmedabad. Mr.Surendrasinh Gambhirsinh Gohil, who was then PI of Ellisbridge Police Station, on learning about the incident from PSO of the Police Station went to Ellisbridge Police Station. Regarding the incident of murder of deceased Geetaben, complaint was lodged

by Police Constable Radheshyam Chhotelal before PI Mr.Gohil. On the basis of the complaint of Police Constable Radheshyam, offences were registered against the appellants and others. At V.S.Hospital, PSI Mr.Parmar held inquest on the dead body of the deceased and made arrangements for sending the dead body of the deceased for postmortem examination. The big knife and another knife produced by the appellants which were bloodstained were seized under a panchnama. Under the same panchnama, condition of person of each of the appellants was noted and clothes put on by them, which were found to be bloodstained, were also seized. The said panchnama was drawn on August 27, 1993 between 17.15 hours and 18.15 hours. As the appellants had sustained minor injuries, they were referred to V.S.Hospital for medical examination. The Investigating Officer also drew the panchnama of place of incident. At the place of incident, a hunter was found lying, which was seized. The scooter, on which the appellants had come and intercepted the rickshaw in which the deceased was travelling, was also seized. The incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. The Investigating Officer recorded statements of those persons, who were supposed to be conversant with the facts of the case. Witness Gogaji was not available at his house as he had left his house out of fear. The Investigating Officer could contact him only after six days of the day of the incident. His statement was recorded and a yadi was sent to

Executive Magistrate Mr.Parmar to hold identification parade. Accordingly, identification parade was held on September 3, 1993 where witness Gogaji identified the two appellants as assailants of deceased Geetaben. The investigation further revealed that a conspiracy was hatched by the appellants with four others, i.e. (1) Iqbal Yakubbhai Kureshi @ Haji Iqbal; (2) Gulam Gosh @ Gosiyo Langado Abdulrasheed Kureshi; (3) Mohmed Iqbal @ Iqbal Chinabhai Mohmed Hanif Kureshi; (4) Salim Ahmed @ Babakhan Ibrahimbhai Kureshi, to kill deceased Geetaben and, therefore, they were also arrested. On completion of investigation, the appellants and four others were chargesheeted in the Court of learned Metropolitan Magistrate Court No.15, Ahmedabad, for commission of offences punishable under Section 302 read with Section 120B IPC and Section 135(1) of the Act. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Ahmedabad City, for trial where it was numbered as Sessions Case No.140 of 1996.

3. The learned Additional Sessions Judge, Court No.12, Ahmedabad City, to whom the case was made over for trial, framed necessary charge against the appellants and four other accused at Exh.9. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Dr.Dineshbhai Savjibhai Chandana as P.W.-1 at Exh.17; (2) complainant, i.e. Police

Constable Radheshyam Chhotelal as P.W.-2 at Exh.21; (3) Dr.Ravindra Shrikrishna Bhise as P.W.-3 at Exh.23; (4) eye witness Police Jamadar Jashuji Takhuji as P.W.-4 at Exh.25; (5) eye witness Gogaji Surajmal as P.W.-5 at Exh.27; (6) Nizamuddin Gyasuddin Shaikh as P.W.-6 at Exh.29; (7) Police Constable Jethabhai Khengarbhai as P.W.-7 at Exh.31; (8) Labour Contractor Haribhai Govindbhai as P.W.-8 as Exh.33; (9) Dineshbhai Laljibhai as P.W.-9 at Exh.35; (10) Babulal Mohanlal as P.W.-10 at Exh.37; (11) Dineshbhai Bhavanbhai as P.W.-11 at Exh.39; (12) Saburbhai Gambhirbhai as P.W.-12 at Exh.42; (13) Investigating Officer i.e. PI Mr.Surendrasinh Gambhirsinh Gohil as P.W.-13 at Exh.45; and (14) Executive Magistrate Mr.Jageeshbhai Sunderlal Parmar as P.W.-14 at Exh.50, to prove its case against the appellants and other accused. The prosecution also produced documentary evidence such as; inquest report at Exh.14; panchnama indicating seizure of the clothes of the deceased at Exh.15; injury certificate of Police Constable Radheshyam Chhotelal Lahori issued by Dr.Chandana at Exh.18; injury certificate of the appellant No.2 in Criminal Appeal No.575 issued by Dr.Chandana at Exh.19; certificate indicating injuries sustained by the appellant No.1 in Criminal Appeal No.575 of 1997 issued by Dr.Chandana at Exh.20; complaint lodged by police constable Radheshyam at Exh.22; postmortem report prepared by Dr.Bhise at Exh.24; extract of entry made at Ellisbridge Police Station pursuant to the information conveyed by Dr.Rakesh N. Patel to Police Jamadar

Jethabhai at Exh.32; panchnama of place of incident at Exh.34; panchnama of collection of blood samples of the two appellants at Exh.36; panchnama indicating arrest of the appellants and seizure of blood-stained weapons produced by them as well as their bloodstained clothes at Exh.38; panchnama indicating seizure of the bloodstained clothes of Hitesh at Exh.40; extract of entry made in Police station diary pursuant to the information sent by Dr.Patel at Exh.43, notification issued by the competent authority under the provisions of Section 37 of the Act at Exh.44; report of FSL at Exh.48; panchnama indicating that identification parade was held by Executive Magistrate Mr.Parmar and that the appellants were identified by witness Gogaji as assailants of the deceased at Exh.52, etc. in support of its case against the appellants and others.

4. After recording of the prosecution witnesses was over, the learned Judge of the trial Court explained to the appellants and other accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code. In his further statement, the appellant No.1 in Criminal Appeal No.575 of 1997 claimed permission to produce certain documents. One of the documents was an application dated April 9, 1997 made by the appellants. In the application, it was stated that no evidence worth the name was adduced by the prosecution against the original accused Nos.3 to 6 to

substantiate charge of conspiracy levelled against them and, therefore, they should be acquitted. It was claimed that deceased Ms.Geetaben was known to Dr.Pravin Togadiya, who was President of Vishwa Hindu Parishad, and as the Police had investigated the case as desired by Dr.Togadiya, the prosecution case should not be accepted. It was mentioned in the application that out of 64 witnesses mentioned in the charge-sheet, only few were examined with an oblique motive and, therefore, the case of the prosecution should be disbelieved. According to the appellants in Criminal Appeal No.575 of 1997, the incident had not taken place at about 2-55 hours as claimed by the prosecution, but had happened subsequently and, therefore, the prosecution case should not be believed. It was mentioned in the said application that the investigation papers indicated that the appellant No.1 in Criminal Appeal No.575 of 1997 had handed over the pistol shaped knife to Constable Radheshyam, but, in fact, the knife found lying on the ground was picked up, which makes the case of the prosecution against the accused doubtful. It was stated in the application that Hitesh, who was travelling with deceased Ms.Geetaben in the rickshaw, was not examined with an oblique motive and, therefore, an adverse inference should be drawn against the prosecution. By filing the said application, it was emphasised that the accused were innocent and should be acquitted. In his further statement recorded under Section 313 of the Code, the appellant No.2 in Criminal Appeal No.575 of

1997 claimed that his case would be explained to the Court by his learned lawyer. The further statements of other accused were also recorded by the learned Judge, but no specific defence was pleaded by them. It is relevant to notice that though the appellant Nos.1 and 2 had submitted a detailed application taking up several defences and contentions, no defence evidence was adduced by any of them at all.

5. On scrutiny of the evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that Ms.Geetaben Bachubhai Rambhiya died a homicidal death. The learned Judge carefully considered the testimony of three witnesses namely; (1) complainant Radheshyam Chhotelal recorded at Exh.21; (2) Police Constable Jashuji Takhuji recorded at Exh.25; and (3) eye witness Gogaji Surajmal recorded at Exh.27, and concluded that their evidence was cogent, trustworthy and free from any serious infirmity. Placing reliance on their evidence, the learned Judge held that it was proved by the prosecution beyond pale of doubt that the appellants had inflicted knife blows on the deceased and murdered her. The plea that police statement of eye witness Gogaji Surajmal was recorded after six days and, therefore, his testimony should not be relied upon, was not accepted by the learned Judge of the trial Court. The learned Judge also negatived the contention of the defence that for non-examination of several witnesses, a case was made out by the

defence for drawing adverse inference against the prosecution. The plea that the incident had not taken place at 2.30 p.m., but had taken place subsequently on the day of incident was also rejected by the learned Judge. The learned Judge held that witness Gogaji had seen the whole incident and had correctly identified the appellants in Criminal Appeal No.575 of 1997 as perpetrators of crime at the identification parade. The learned Judge noticed that the contents of report of FSL produced by the prosecution at Exh.48 and held that find of same group of blood as that of the deceased on the clothes of the appellants and weapons recovered from them established that the appellants were in close proximity of the deceased when the deceased was fatally wounded. The learned Judge further held that it could not be proved by the prosecution that a criminal conspiracy was hatched by the appellants in Criminal Appeal No.575 of 1997 with rest of accused to murder deceased Geetaben and, therefore, charge under Section 120B IPC was not proved. The learned Judge also noticed that it was not proved by the prosecution that Notification under Section 37 of the Act prohibiting use of dangerous weapons mentioned therein was issued by the competent authority and held that the appellants were not liable to be convicted for commission of offence under Section 135(1) of the Act. In view of abovereferredto conclusions, the learned Judge convicted the appellants in Criminal Appeal No.575 of 1997 for commission of offence punishable under Section 302 read with Section 34 IPC and

acquitted the rest of the four accused. The learned Judge of the trial Court thereafter heard the learned counsel of the parties on the question of sentence to be imposed on the appellants for commission of offence punishable under Section 302 read with Section 34 IPC. Though the learned Judge deduced that gruesome murder of the deceased was committed in broad daylight by the appellants, the case was not one of the rarest of the rare case as explained by the Supreme Court in **Bachan Singh vs. State of Punjab, A.I.R. 1980 SC 898** and **Machi Singh & Ors. vs. State of Punjab, A.I.R. 1983 SC 957** and, therefore, held that no case was made out by the prosecution for imposition of capital punishment on the appellants. In view of the said conclusion, the learned Judge has imposed sentence of R.I. for life and fine of Rs.1,000/-, in default R.I. for three months, on each appellant in Criminal Appeal No.575 of 1997 by judgment dated April 24, 1997, giving rise to said appeal. It may be stated that the State has not challenged acquittal of the original accused Nos.3 to 6 and, therefore, their acquittal has become final. As noticed earlier, in Criminal Appeal No.525 of 1997, the claim of the State Government is that having regard to the manner in which the incident had taken place and gruesome murder of a helpless young woman, capital punishment should have been imposed on the appellants. In Criminal Appeal No.526 of 1997 the claim of the State Government is that the appellants of Criminal Appeal No.575 of 1997 should have been convicted for commission of offence punishable under Section

135(1) of the Act in view of the Notification issued by the competent authority under Section 37 of the Act, which is produced at Exh.44 on the record of the case.

6. Mr.Y.S.Lakhani, learned counsel of the appellants in Criminal Appeal No.575 of 1997, contended that the genesis of the incident having been suppressed by the prosecution, unwarranted conviction of the two appellants under Section 302 read with Section 34 IPC should be set aside. Elaborating this contention, it was argued that the documents produced by the appellant No.1 at the time of recording of his statement under Section 313 of the Code indicate that panchnama of seizure of six calves pursuant to the complaint lodged by deceased Geetaben was completed between 13-50 hours and 14-20 hours on August 27, 1993 after which deceased Geetaben in the company of witness Gogaji Surajmal and others had gone to Panjarapole to leave the cattle to the care of said institution from where they had gone to a road side stall to take tea and, thereafter had proceeded towards C.N.Vidyalaya, Ambawadi and, therefore, the case of the prosecution that the incident had taken place at about 2.30 p.m., should not have been accepted by the learned Judge of the trial Court. What was claimed by the learned counsel of the appellants was that the incident must have taken place between 3.00 p.m. and 3.30 p.m., and as the prosecution has suppressed the genesis of the incident, the whole case of the prosecution should be disbelieved. The

learned counsel argued that the prosecution has neither examined Hitesh, who was with deceased Geetaben in the loading rickshaw and who had removed the deceased to V.S.Hospital for treatment, in spite of the fact that his bloodstained clothes were seized by the Police during the course of investigation nor the prosecution has examined PSI Mr.Parmar, who had held inquest on the dead body of the deceased after reaching V.S.Hospital pursuant to message sent by Police Constable Jethabhai; nor the prosecution has examined panch-witnesses, who were summoned to witness as to what transpired at I.T. Parade held by Executive Magistrate Mr.Parmar; nor the prosecution has examined S.R.P. Jawan, who had aimed his rifle at the appellant No.1 and as the material witnesses have not been examined by the prosecution with an oblique motive, the prosecution case should be disbelieved after drawing adverse inference as provided under Section 114 of the Evidence Act. It was asserted by the learned counsel of the appellants that late recording of police statement of witness Gogaji makes it evident that he is a got-up witness and as delay in recording his police statement is not explained by the Investigating Officer, the testimony of witness Gogaji deserves to be discarded while determining the guilt or otherwise of the appellants. It was argued that it is not explained by the Investigating Officer as to how he was able to trace witness Gogaji and thereafter record his police statement, and as vital missing links are not brought on the record by the prosecution,

testimony of witness Gogaji should not be relied upon by this Court. According to the learned counsel of the appellants, the incident had taken place between 3.00 p.m. and 3.30 p.m., but Police Constable Radheshyam and Police Jamadar Jashuji were projected to be eye witnesses to help the prosecution case falsely and as they have stated that the incident in question had taken place at about 2.30 p.m. near C.N.Vidyalaya, their evidence should be disbelieved. The learned counsel further emphasised that Police Constable Radheshyam had received superfluous injuries for which he was referred to RMO of V.S.Hospital and before the doctor, he had narrated that he had sustained injuries in a vehicular accident in the afternoon, which shows that he was not an eye-witness and, therefore, could not have been relied upon by the learned Judge of the trial Court for fastening criminal liability on the appellants. It was pointed out to the Court that the assertion made by witness Radheshyam Chhotelal that he had taken into his possession bloodstained knife from the hand of the appellant No.1 stands falsified in view of the statement made by the Investigating Officer that the knife lying on the ground was picked up and, therefore, no reliance should be placed on the testimony of witness Radheshyam Chhotelal. The learned counsel argued that no evidence could be collected by the Investigating Officer to establish that witness Gogaji was owner of the loading rickshaw in which the deceased was travelling at the time of incident and, therefore, the learned Judge of the trial

Court was not justified in treating witness Gogaji as one of the eye-witnesses to the incident. The learned counsel stressed that the blood samples of the appellants were not taken in presence of panch-witnesses under a panchnama and as possibility of using blood of the appellants subsequently on weapons and clothes of the appellants is not ruled out, the report of FSL should not have been taken into consideration by the Court while considering the evidence of the prosecution against the appellants. The learned counsel asserted that the panchnama of place of incident indicates that a hunter and an iron-bar were also seized from the place of incident, but no investigation was made as to whom those articles were belonging nor any attempt was made to find out as to the scooter on which the appellants had allegedly come, was belonging to whom, which shows that the investigation was faulty. To highlight that the investigation was not only faulty but prejudicial to the appellants, it was pointed out that receipt Exh.28 allegedly produced by witness Gogaji indicating that he had received rent from deceased Ms.Geetaben for hiring his rickshaw bears the date of August 28, 1997 whereas the incident took place on August 27, 1997 and it was contended that the impugned judgment in the appeal should be set aside by giving benefit of doubt to the appellants. According to the learned counsel of the appellants, the conspiracy as envisaged by Section 120B IPC could not be proved by the prosecution as a result of which, the four accused have been acquitted and in absence of charge

under Section 34 IPC, the appellants could not have been convicted for commission of offence punishable under Section 302 with the aid of Section 34 IPC. The learned counsel asserted that the prosecution has not proved that which appellant caused which injuries on which part of the body of the deceased and, therefore, the conviction of the appellants under Section 302 IPC read with Section 34 IPC should be regarded as erroneous. The learned counsel of the appellants contended that the learned Judge of the trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be accepted.

7. Mr.H.M.Prachchhak, learned Additional Public Prosecutor for the State, contended that the genesis of the incident is not suppressed by the prosecution at all and as the incident in question is unfolded by the three main witnesses in a simple manner, the learned Judge of the trial Court, who had advantage of observing demeanour of witnesses, was justified in acting upon their evidence for convicting the appellants under Section 302 read with Section 34 IPC. According to the learned Additional Public Prosecutor, Exh.43, which is an intimation received by the PSO of Ellisbridge Police Station from Jamadar Jethabhai, who was posted at V.S. Hospital, makes it very evident that at 14.55 hours on August 27, 1993, deceased Geetaben was declared as brought dead and, therefore, it is wrong to contend that the incident had not taken place at about

2.30 p.m. as claimed by the three witnesses, but had taken place between 3.00 p.m. and 3.30 p.m. on August 27, 1993 as asserted by the learned counsel of the appellants. It was pointed out by the learned counsel of the State Government that even in the inquest report, it is mentioned that the incident had taken place at about 14-15 hours on August 27, 1993 and it is not correct to say that the genesis of the incident was suppressed by the prosecution. The learned counsel argued that true copy of panchnama prepared by First Grade Jamadar of Astodia Police Station pursuant to complaint lodged by deceased Geetaben Shah against Rajubhai and another for commission of offences punishable under Sections 378 and 335(1) of the Bombay Provincial Municipal Corporations Act, 1949 cannot be received and/or read in evidence in the instant proceedings as it is not a secondary evidence within the meaning of Section 65 of the Evidence Act nor a certified copy of the public document within the meaning of Section 76 of the said Act, for the purpose of determining the question whether the incident had taken place between 2.15 p.m. and 2.30 p.m. on August 27, 1993 or had taken place after 3.00 p.m. on the said date. According to the learned Additional Public Prosecutor, the whole prosecution case stands unfolded by the reliable testimony of the three witnesses examined by the prosecution and no case is made out by the defence for drawing adverse inference against the prosecution for non-examination of other witnesses. The learned counsel emphasised that the evidence of witnesses examined by

the prosecution is truthful, reliable as well as acceptable and, therefore, mere fact that some other witnesses were not examined will not adversely affect the prosecution case at all. In support of this submission, the learned Additional Public Prosecutor relied upon decision in **Pohlu vs. State of Haryana, 2005 SCC (Cri.) 1496.** It was argued on behalf of the State that the testimony of witness Radheshyam Chhotelal does not become doubtful at all merely because he had given history of injury sustained by him as vehicular accident inasmuch as in his substantive evidence before the Court also, he has stated that when attempt was made by the appellants to flee on the scooter, a portion of the scooter had dashed with him as a result of which, he had sustained injury on his ankle and, therefore, his testimony should be acted upon by this Court as is acted upon by the learned Judge of the trial Court. Mr.Prachchhak, learned counsel of the State Government, asserted that the loading rickshaw belonging to Gogaji in which the deceased was travelling, was not used for any commission of crime at all and, therefore, non-seizure of the same during the course of investigation would not indicate that the deceased was not travelling in the said rickshaw nor would it indicate that the deceased with others had not come to the place near C.N.Vidyalaya, Ambawadi, Ahmedabad, where the incident had taken place nor would indicate that the investigation was unfair. The learned counsel maintained that it is not always necessary that blood samples of the accused should be taken in

the presence of panch-witnesses and as the Investigating Officer has categorically stated that he had taken samples of blood of the appellants, FSL Report should not be discarded from the consideration as is contended by the learned counsel of the appellants more particularly when bloodstained weapons and bloodstained clothes of the appellants were seized under a panchnama drawn at the Police Station itself immediately after lodging of complaint by Constable Radheshyam. It was argued that possibility of using blood of the appellants subsequently on the weapons and clothes of the appellants is not even remotely suggested to the Investigating Officer and as the said possibility has no factual foundation whatsoever, it should not be taken into consideration by the Court while considering the effect of FSL Report against the appellants. It was pleaded that it is neither the case of the appellants nor anyone else that the deceased was assaulted with hunter and/or iron-bar and, therefore, it was not necessary for the Investigating Officer to find out as to whom those articles belonged. The learned counsel of the State contended that the learned Judge of the trial Court in operative part of the judgment has directed the learned Chief Metropolitan Magistrate, Ahmedabad, to conduct a separate inquiry regarding the scooter bearing registration No.GAL-5070 and to pass appropriate orders under Section 452(3) of the Code and, therefore, it is wrong to contend that investigation was in complete as the Investigating Officer could not ascertain as to whom the scooter belonged.

Mr.Prachchhak, learned Additional Public Prosecutor for the State, asserted that in absence of charge under Section 34 IPC, the accused can always be convicted under Section 302 read with Section 34 IPC if evidence justifies such conviction and as the conviction of the appellants under Section 302 read with 34 IPC is justified, the conviction of the appellants under Section 302 read with Section 34 IPC should not be regarded as erroneous on the ground that there was no charge against the appellants under Section 34 IPC more particularly when it could not be pointed by the appellants that they had suffered any prejudice. The learned counsel of the State Government further asserted that cogent and convincing reasons have been assigned by the learned Judge of the trial Court for convicting the two appellants for commission of offences punishable under Section 302 read with Section 34 IPC and as the learned counsel of the appellants has failed to dislodge those weighty reasons, Criminal Appeal No.575 of 1997, which lacks merits, should be dismissed.

8. With reference to Criminal Appeal No.525 of 1997 filed for enhancement of sentence filed under Section 377 of the Code, the learned Additional Public Prosecutor asserted that having regard to (1) the manner in which heinous commission of murder of deceased Geetaben was committed; (2) magnitude of crime; (3) personality of victim of murder, who was a helpless lady, the case on hand should be treated as one

of the rarest of rare cases as explained by the Supreme Court in **Machi Singh vs. State of Punjab, A.I.R. 1983 SC 957** and, therefore, capital punishment should be imposed on the appellants in Criminal Appeal No.575 of 1997.

Mr.Y.S.Lakhani, learned counsel of the appellants in Criminal Appeal No.575 of 1997, on the other hand, argued that having regard to (1) the age of the accused at the time of incident; (2) probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society; (3) probability that the accused can be reformed and rehabilitated; (4) distance of time between the date of incident and consideration of the question whether death sentence should be imposed on the appellants or not; (5) major part of the substantive sentence imposed on the appellants having been undergone by them and other mitigating circumstances, capital punishment as prayed for by the State Government should not be imposed on the appellants in Criminal Appeal No.575 of 1997.

9. With reference to Criminal Appeal No.526 of 1997 filed under Section 378 of the Code challenging acquittal of the appellants under Section 135(1) of the Act, the learned Additional Public Prosecutor for the State, drew attention of the Court to Exh.54, which is a pursis submitted by learned Special Public Prosecutor before the trial Court mentioning,

inter alia, that necessary notification issued by the competent authority under the provisions of Section 37(1) of the Act having been accepted by the appellants, is already exhibited and, therefore, the witnesses were not examined to prove the same and contended that the learned Judge of the trial Court was not justified in acquitting the appellants in Criminal Appeal No.575 of 1997, for commission of offence punishable under Section 135(1) of the Act.

Mr.Y.S.Lakhani, learned counsel of the appellants, brought to the notice of the Court Exh.12, which is list of documents submitted by the prosecution, and pleaded that Mark 12/10, which was notification issued by the competent authority under Section 37(1) of the Act was never admitted by the appellants and, therefore, the learned Judge of the trial Court was justified in acquitting the appellants in Criminal Appeal No.575 of 1997 for commission of offence punishable under Section 135(1) of the Act when notification issued under Section 37(1) of the Act could not be proved to have been issued by the competent authority. The learned counsel of the appellants emphasised that no ground is made out by the prosecution for convicting the appellants in Criminal Appeal No.575 of 1997 for commission of offence punishable under Section 135(1) of the Act and, therefore, Criminal Appeal No.526 of 1997, which has no substance, should be dismissed.

10. This Court has heard Mr.Y.S.Lakhani, learned counsel of the appellants, and Mr.H.M.Prachchhak, learned Additional Public Prosecutor for the State, at length and in great detail. The evidence on record has been read and re-read by the learned counsels of the parties. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

11. The first question which deserves to be determined by the Court is whether it is proved by the prosecution beyond reasonable doubt that deceased Ms.Geetaben died a homicidal death. The three witnesses namely; (1) Radheshyam Chhotelal; (2) Police Jamadar Jashuji Takhuji; and, (3) Gogaji Surajmal, have stated in their evidence before the Court that the deceased was inflicted knife blows by the appellants. The injuries sustained by the deceased are noted in inquest report of the deceased produced by the prosecution at Exh.14. As noticed earlier, PSI Mr.Parmar of Ellisbridge Police Station had held inquest on the dead body of the deceased and made arrangements for sending the dead body of the deceased to the hospital for postmortem examination. The record shows that postmortem examination on the dead body of the deceased was conducted by a panel of doctors comprising Dr.R.S.Bhise, who was then an Associate Professor in Forensic Medicine, V.S.Hospital, and Dr.D.M.Desai, who was Junior Lecturer in

Forensic Medicine. The prosecution has examined Dr.Bhise as P.W.-3 at Exh.23. Dr.Bhise in his substantive evidence before the Court has stated that on August 27, 1993, he was serving as an Associate Professor in Forensic Medicine in V.S.Hospital, Ahmedabad, and on that day at about 5.50 p.m., he was handed over dead body of Ms.Geetaben for postmortem examination. The witness has stated that he commenced postmortem examination at 5.55 p.m. and completed at 7.00 p.m. The doctor, in his substantive evidence before the Court, has enumerated external as well as internal injuries, which were noticed by him and Dr.Desai after examination of the dead body of the deceased. The external injuries, which were noticed, were as under:

External Injuries:-

(1) Incised wound on the left palm in the web space between ring finger & middle finger, the bone is seen cut on the middle finger root, size 3cm x 2cm x bone deep, the edges of the wound are contused.

(2) Incised wound on middle of left palm which is seen cut along its long axis, the tendons are clear cut, size 4 cm x 0.5 cm x muscle deep.

(3) Incised wound on dorsal aspect of left little finger 2 cm x 0.5 cm x muscle deep.

(4) Chop wound on the left forearm, extending from the lateral aspect of left wrist, going vertically downward, 14 cm x 5 cm x bone deep, exposing ulna bone which is chopped off vertically and slashed muscles, just near the mid of forearm on left at the posterolateral edge of this wound, there is another vertical parallel wound, 5 cm x 1 cm and it is muscle deep.

(5) Incised wound at the tip of right thumb, horizontal 1.5 cm x 0.5 cm x muscle deep. Similar incised would is also seen, at the tip of right middle finger 1.5 cm x 0.5 cm x skin deep.

(6) Incised wound in the web space between right ring and middle finger on palmer aspect 1 cm x 0.5 cm muscle deep.

(7) Incised wound on the tip of right little finger horizontal, 0.75 cm x 0.3 cm x skin deep.

(8) Linear incised wound on the lateral aspect of right elbow obliquely downwards and lateral, 6 cm x 0.2 cm x skin deep, lower and of it is 2 cm deep in muscles.

(9) Stab wound just below the right clavicle in mid clavicular line, horizontal 3.8 cm x 1 cm x cavity deep, medial angle acute, lateral angle is semilunar.

(10) Stab wound just below the medial end of left clavideo horizontal 4 cm x 0.75 cm x cavity deep, medial angle is semilunar, lateral angle is acute with tailing of.

(11) Stab wound, 3 cms above the left nipple horizontal 4 cm x 1.25 cm x 1 cm deep muscle on breast. Lateral angle acute, medial angle is semilunar.

(12) Stab wound on left breast 4 cm below and lateral to left nipple in its lower lateral quadrant 4 cm x 0.5 cm x muscle deep.

(13) Stab wound on left side of upper part of abdomen in mid clavicular line just below the costal margin, horizontal, 4 cm x 1 cm x cavity deep, medical angle is acute, later semilunar.

(14) Stab wound two in number in left paramedian, 8 cms below aciphoid, 2.8 cm x 1 cm x cavity deep and 2.75 cm x 1 cm x cavity region deep, just below each other in same plane both show lower angle acute, upper semilunar.

(15) Stab wound vertical, in left lateral aspect of middle part of abdomen in mid clavicular line 5 cm x 2 cm x cavity deep, one angle is acute and upper is semilunar.

(16) Incised wound on the front of left thigh in its middle, 6 cm x 0.2 cm x muscle deep, vertical.

(17) Stab wound right subscapular region at T7 level on back vertical, 3 cm x 2 cm x cavity deep.

(18) Stab would right gluteal region, horizontal 4 cm x 2 cm x muscle deep. (5cm), the wound is curved upward towards L4L5

(19) Stab wound on left axilla on posterior axillary fold, vertical, 3 cm x 2 cm x cavity deep upper angle acute, lower is semilunar.

(20) Abrasion on left gluteal region on lower lateral part 3.5 cm x 2 cm read in colour.

(21) Abrasions with contusions on are scattered on mid of forehead (2 cm x 1 cm) left frontal eminence (1 cm x 1 cm) bridge of nose, upper lip and right small eminence 1 x 1 cm in size. All red in colour.

All the above described injuries are antemortem in nature.

The internal injuries, which were noticed during the Course of postmortem examination, were as under:

Internal Injuries:-

(1) Correspondent to Ext. Inj. (9). The wound has cut the muscles underneath, the costal cartilage, has entered the plural cavity piercing the upper lobe of right lung thro '& thro', the posterior end of the wound cannot be traced. The tract is tapering and antero-posterially measuring about 9.8 cms.

(2) Corresponding to Ex. Inj. (10). The wound has cut the muscles, sternum in its upper left part & has pierced the left plural cavity. It has the major blood vessels and arteries underneath. The tract is about 8 cms long , antero-posterially downwards.

(3) Corresponding to Ex. Inj. (13). The wound has cut the muscles, the costal cartilage on left side and has gone into the diaphragm. It has cut the diaphragms and left lower lobe of lung. Then it has gone into the pericardium and pierced the right ventricle of the heart, where the tract is seen ending. The tract is seen going backwards & upwards, tapering and measures about 12.5 cms in length.

(4) Corresponding to Ext. Inj. (14). Both the wounds have cut the abdominal wall and has pierced the peritoneum. Then they have cut small intestine at four place sixes varying from 2.5 cm x 0.5 cm. thro '& thro'. The tracts are then seen on the messentary which is seen cut at two places 2.2 cms x 1 cm & 2.0 cm x 0.75 cm both the tracts are anteroposteriar & about 7.5 & 8 cm in length.

(5) Corresponding to Ext. Inj. (15). The wound has cut the abdominal wall & terminates into the abdominal cavity. The tract is about 5 cms in length and directed from left to medial.

(6) Corresponding to Ext. Inj. (17) & (19). Both the wounds are muscle deep.

Both sides of thoracic cavity contain about 1.2 liters of blood and clots. Pericardial cavity contains about 200 cc of blood and clots.

The injuries, which are mentioned by Dr.Bhise in his substantive evidence before the Court, are noted in detail in postmortem examination report of the deceased, which is produced by the prosecution at Exh.24. It is nobody's case that the injuries, which were noticed on the dead body of the deceased, were accidental or self-inflicted. On the facts and in the circumstances of the case, this Court is of the opinion that it is firmly established by the prosecution that deceased Ms.Geetaben died a homicidal death and the finding recorded by the learned Judge of the trial Court being eminently just on this point, is hereby upheld.

12. The next question which arises for determination of the Court is whether the prosecution has been successful in proving charge of murder of deceased Ms.Geetaben levelled against the appellants. In order to answer this question, it would be relevant to notice testimony of the three witnesses namely; (1) Police Constable Radheshyam Chhotelal, who is examined as P.W.-2 at Exh.21; (2) Police Jamadar Jashuji

Takhuji, who is examined as P.W.-4 at Exh.25; and (3) Gogaji Surajmal, who is examined as P.W.-5 at Exh.27.

12.1 Police Constable Radheshyam Chhotelal, examined at Exh.21, has stated before the Court that at about the time of incident, he was serving as a Police Constable in Ellisbridge Police Station and was posted at Chhadavad Police Chowky. According to him, the incident had taken place on August 27, 1993. It is mentioned by him that he was assigned patrolling duty at Kameshwar Flat falling within the jurisdiction of Chhadavad Police Chowky and his duty hours were from 2.00 p.m. to 8.00 p.m. The witness has mentioned that on the day of incident, he was going to bus stand to catch a bus for Kameshwar Flat at about 2.00 p.m. and he saw that opposite the bus stand, a green coloured loading rickshaw was parked where one person was inflicting knife blow on a woman. The witness has mentioned that the bus stand near C.N.Vidyalaya is situated on left hand if one goes from Chhadavad Police Chowky whereas the incident had taken place opposite the bus stand on road side. According to the witness, the person, who was inflicting knife blows on the woman was a stout person and, therefore, he had rushed towards the place of incident to apprehend the said person. The witness has mentioned that with the person who was stout, there was another person, and in order to flee from the place of incident, they had sat on the scooter with their respective knife. The witness has mentioned that he had caught

hair of the person who was stout and in that process, the scooter had dashed with him as a result of which, he had sustained minor injuries on his right leg. The witness has mentioned that the person, who was stout, was driving the scooter, but as he had caught hair of the said person and the scooter had collided with his leg, both of them had fallen down with the scooter. The witness has claimed that both the persons had attempted to mount an assault on him and a scuffle had ensued between him and the person who was stout as a result of which, bushirt of the stout person was torn and had fallen down. The witness has stated that at that point of time, there was one S.R.P. Point from where an SRP Jawan had come and aimed his loaded rifle at the person who was stout and, therefore, the person who was stout, had no option but to raise his hands and as soon as the stout person had raised hands, he had taken from his hand the pistol shaped knife, which was bloodstained. The witness has stated that second person had started running towards Excise Chowky, which is situated on way to Panjarapole from C.N.Vidyalaya. The witness has mentioned that thereafter, he in the company of the SRP Constable had brought the person, who was stout, to Chhadavad Police Chowky. According to this witness, during this time, one Police Inspector had come from Excise Chowky and had started chasing another person, who was trying to flee towards the Excise Chowky, and the name of that Police Inspector was Mr.Parmar. The witness has mentioned that after he had reached to Chhadavad Police Chowky, within no time

Head Constable Jashuji Takhuji had brought another person, who was trying to flee towards Excise Chowky. The witness has mentioned that thereafter both the persons, who were apprehended, were taken to Ellisbridge Police Station in a mobile-van of Ellisbridge Police Station. The witness has mentioned that after reaching Ellisbridge Police Station, he had informed the PSO of Ellisbridge Police Station about the incident who, in turn, had informed the Police Inspector of Ellisbridge Police Station. The witness has mentioned that at that time, Mr.S.G.Gohil was Police Inspector of Ellisbridge Police Station. The witness has stated before the Court that when he was talking with PSO and PI of Ellisbridge Police Station, a telephonic message/verdhi was received from V.S. Hospital informing that Ms.Geetaben, who was injured, had expired and, therefore, PSI Mr.Parmar, who was in the Investigation Squad of Ellisbridge Police Station, had gone to V.S. Hospital. The witness has mentioned that thereafter, PI Mr.Gohil had arrived at the Police Station and immediately he had lodged his complaint before Mr.Gohil. This witness has produced complaint lodged by him before PI Mr.Gohil at Exh.22. The witness has mentioned that a big knife, which was in the hand of the person who was stout, was with him whereas another big knife belonging to another person was with Police Jamadar Jashuji Takhuji and that both the weapons on being produced were seized by PI Mr.Gohil from them. According to this witness, in his presence, persons of the appellants were

examined and the weapons produced were seized under a panchnama. The witness has stated that thereafter, he had taken PI Mr.Gohil to the place of incident and pointed out the place where the incident had taken place. According to this witness, the scooter and the torn bushirt were found lying at the place of incident. The witness has further stated that thereafter he had gone to V.S.Hospital for taking treatment. The witness has claimed before the Court that he was able to identify the person who was heavily built and apprehended by him as well as another person, who was apprehended by Police Jamadar Jashuji Takhuji. During the course of recording of his examination-in-chief, the witness identified both the appellants, who were present in the courtroom. The witness was also shown the weapon which he had taken away from the hand of the person, who was heavily built and after looking at the weapon, he stated that it was the same knife, which was taken by him from the hand of person, who was heavily built. The witness was also shown Article No.6, which was the knife recovered from another person, who was apprehended near the Excise Chowky and after looking at the same, it was claimed by him that it was the same weapon, which was found from another person.

12.2 The witness was cross-examined by the defence at length and he was subjected to gruelling cross-examination. In his cross-examination, the witness has stated that his duty hours and duty hours of Head Constable Jashuji Takhuji were the

same. According to him, before he had left Chhadavad Police Chowky for performing duties, Head Constable Jashuji Takhuji had also reported at Chhadavad Police Chowky. The witness has stated that Head Constable Jashuji Takhuji was in the Police Chowky when he had left for bus stand situated near C.N.Vidyalaya. The witness has mentioned that after reporting for duty at Chhadavad Police Chowky, he had taken tea and spent time of about ten minutes at the Police Chowky. According to him, when he was going to bus stand, he was in uniform and his attention towards the incident was drawn because of hubbub resulting from the incident in question. The witness has mentioned that at the main circle, people had collected and the time of the incident was about 14-25 hours. According to this witness, after leaving Chhadavad Police Chowky, he had not stopped anywhere while on way to the bus stand. The witness has further clarified that one would hardly take 4 to 5 minutes to reach the bus stand from Chhadavad Police Chowky. The witness has also mentioned that he had noticed that the loading rickshaw was on the right side of the main road and its face was towards Chhadavad Police Chowky, but he was not able to remember as to how many persons were near the rickshaw. The witness has mentioned that he had not seen any person near the rickshaw with iron-bar nor had he seen any person inflicting blows with iron-bar. The witness has claimed that he had not seen hunter in the hands of anyone. The suggestion made by the defence to this witness that it was not stated by him in his

complaint that a person was inflicting knife blows on a woman near the green coloured loading rickshaw is emphatically denied by him. According to this witness, he was hardly at a distance of 20 to 25 feet from where the incident had taken place. The witness has informed the Court that he had not raised the shouts after apprehension of the person, who was inflicting blows with knife on the woman. According to this witness, the SRP Constable had reached the place of incident within 5 to 7 minutes after he had started rushing towards the place of the incident. According to this witness, the person, who was having knife in his hand, had gone little ahead of him and SRP Jawan had reached the place after he had apprehended him. According to this witness, he had chased the person, who was fleeing towards Ambawadi Circle and had caught the shirt of that person and, therefore, the scuffle had ensued between him and that person. The witness has stated that the person who was apprehended had attempted to cause injuries to him by means of the knife, but he had warded off the same. It is further clarified by the witness that the person, who was inflicting the blows, was not actually running but was gradually moving ahead. In cross-examination, the witness has mentioned that SRP Jawan had aimed a loaded rifle at the person, who was trying to flee and that he had taken knife from his hand when he had raised his hands because of aiming of loaded rifle at him. The witness has further explained to the Court that he had caught one hand of the person who had inflicted knife blows on the

woman whereas another hand of said the person was caught by SRP Jawan while bringing the apprehended person to Chhadavad Police Chowky. According to this witness, the person, who had made attempt to flee towards circle, was apprehended when he was 2 to 4 feet away from the circle and that from that place, the said person was straightaway taken to Chhadavad Police Chowky. According to this witness, when he had reached Chhadavad Police Chowky, one Writer Head Police Constable and one Police Constable attending the telephone were present. The witness has further stated that he was not knowing whether PI Mr.Parmar was passing on the road when he had apprehended the person, who had assaulted the woman. According to him, 10 minutes after he had reached Chhadavad Police Chowky, Police Jamadar Jashuji Takhuji had come with another person. The suggestion made by the defence that he was subsequently got-up as a witness was denied by him. The suggestion made by the defence that the incident had not taken place 2.30 p.m., but had taken place at 3.30 p.m. was also denied by him. In his further cross-examination, this witness has stated that he had caught the shirt of the person, who had tried to run away and the shirt was caught from collar portion. The witness has mentioned that when shirt had come out, he had not noticed any injury on the person, who was apprehended by him. The suggestion made by the defence that he was limping because of collusion of scooter with his leg, was emphatically denied by him. In his cross-examination the witness has asserted that the person, who was

inflicting knife blows on the woman, was fat and heavily built. According to this witness, the person, who was apprehended by him, was almost of his height. The suggestion made by the defence that he had not taken away the knife from the hand of the person, who was apprehended by him, was emphatically denied by him.

12.3 This is all what transpires from the testimony of witness Radheshyam Chhotelal. On re-appreciation of the evidence of this witness, this Court finds that his testimony is quite clear, categorical and implicitly reliable. It is free from any blemish. It may be mentioned that this witness was neither known to deceased Ms.Geetaben nor to the appellants. He had apprehended the appellant No.1 red-handed in discharge of his official duty. The assertion made by him that his duty hours were from 2.00 p.m. to 8.00 p.m could not be demonstrated to be untrue and, therefore, his assertion that the incident had taken place at about 2-25 p.m. on August 27, 1993 and that he had apprehended the appellant No.1 red-handed deserves acceptance. Though this witness is cross-examined gruelly, nothing could be brought on record to impeach his credibility. No major contradictions and/or omissions could be brought on record by the defence with reference to his First Information Report, which he had lodged promptly and without any loss of time. In fact, this witness stands fully corroborated by his First Information Report. The witness has unfolded the whole

prosecution case in a simple manner without making any noticeable improvements and/or embellishments. As noticed earlier, the witness was not knowing as to who the deceased was and, therefore, the witness had no reason to depose falsely against the appellants. It could not be even remotely suggested by the defence that the witness was on inimical terms with any of the appellants and was, therefore, out to implicate the appellants falsely in such a serious case. On the facts and in the circumstances of the case, this Court is of the firm opinion that the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, did not commit any error in placing reliance on the testimony of this witness for coming to the conclusion that the appellants were the persons, who had mounted fatal assault on the deceased.

13. The next evidence, which deserves to be noticed by the Court, is tendered by Police Jamadar Jashuji Takhuji. Police Jamadar Jashuji Takhuji is examined by the prosecution at Exh.25. The witness has mentioned that he was discharging duties as Police Jamadar in Ellisbridge Police Station since six years. According to him, on August 27, 1993, he was on duty at Chhadavad Police Chowky falling within the jurisdiction of Ellisbridge Police Station and his duty hours were from 2.00 p.m. to 8.00 p.m. The witness has mentioned that on the day of incident, he was assigned patrolling duty and that in order to perform duty, he had reported at Chhadavad Police Chowky at

about 2.00 p.m.. The witness has stated that at about 2.30 p.m., when he was making preparations to leave Chhadavad Police Chowky for performing his patrolling duty, at that time, a person had come to Police Chowky and informed him that a woman was assaulted with knife near C.N.Vidyalaya and one was apprehended by a policeman whereas another was making attempt to run away towards Excise Chowky. The witness has asserted that on learning this fact, he had started running towards Excise Chowky. The witness has stated that a big crowd had gathered near the bus stand situated near C.N.Vidyalaya and the members of the crowd were beating a person. The witness has stated that he had intervened and apprehended the person, who was being beaten, and taken away the knife, which was in his hand. The witness has stated that when he was taking the said persons to Chhadavad Police Chowky, on way he had met PSI Mr.Parmar and PSI Mr.Parmar had also helped him in taking the said person to Chhadavad Police Chowky. The witness has stated that when he reached Chhadavad Police Chowky, he had noticed that Police Constable Radheshyam was sitting there with another person, who had inflicted knife blows on the deceased. The witness has stated that he and Police Constable Radheshyam had interrogated the persons, who were apprehended, and informed the Writer to summon mobile-van to take the apprehended persons to Ellisbridge Police Station. The witness has further mentioned that soon thereafter a mobile-van had arrived and he in the company of Police Constable Radheshyam had taken the two

apprehended persons to the Ellisbridge Police Station. The witness has stated that he had handed over custody of the persons apprehended to Police Inspector on his arrival. During the course of recording of his examination-in-chief, the witness identified the appellant No.2 as the person who was apprehended by him whereas he identified the appellant No.1 as the person, who was apprehended by Police Constable Radheshyam. The witness also identified the knife, which was taken away by him from the hand of the appellant.

13.1 This witness was also cross-examined by the defence at length. In his cross-examination, the witness has stated that he was not knowing whether any big procession was taken out in the area falling within the jurisdiction of Chhadavad Police Chowky on the third day of the incident. The witness has mentioned in his cross-examination that his duty hours were being changed from time to time. According to him, he was not knowing whether *bandh* was observed in the area falling within Chhadavad Police Chowky nor was he knowing that either on the third or the fourth day of the incident, a public meeting was held with reference to the incident in question. The witness has stated that Vishwa Hindu Parishad had searched the shops situated near the place of incident. According to this witness, his police statement was recorded on the day of incident, but he was not knowing as to at what time his police statement was recorded. The witness has further stated that at the time when

the First Information Report was lodged by Police Constable Radheshyam, he was not present. The witness has informed the Court that Kameshwar Flat is situated near the Excise Chowky and that the place from where the appellants were arrested is 2 to 4 furlongs away from Kameshwar Flats. The witness has mentioned that the Excise Chowky is situated at a distance of about 100 to 150 feet from the gate of C.N.Vidyalaya. According to this witness, the appellant No.2 was being beaten by the members of the crowd near the gate of C.N.Vidyalaya, which is on way from Chhadavad Police Chowky. The witness has further clarified that the place where the appellant No.2 was being beaten, was situated near Ambawadi Circle and gate of C.N.Vidyalaya. According to this witness, he had not seen that the person, who was apprehended by Police Constable Radheshyam, had inflicted knife blows. The witness has mentioned that he and Police Constable Radheshayam had not reached Chhadavad Police Station at the same time. In his cross-examination also, the witness has asserted that the incident had taken place at about 2.30 p.m. and the suggestion made to him that the incident had taken place after 3.30 p.m. is emphatically denied by him. The suggestion made by the defence that eye-witnesses were not available and, therefore, he was projected as an eye-witness is also emphatically and assertively denied by him.

13.2 This is all what transpires from the testimony of eye witness Jashuji Takhuji. A fair reading of cross-

examination of witness Jashuji Takhuji makes it evident that on vital points stated by him in his examination-in-chief, he is not effectively cross-examined at all and on those points, his examination-in-chief is allowed to go unchallenged. This witness has also unfolded the prosecution case in a simple manner without making any noticeable improvements and/or embellishments. The scrutiny of evidence of this witness makes it very clear that he was neither knowing deceased Ms.Geetaben nor knowing any of the appellants and more particularly the appellant No.2 from whose hand he had taken away the knife. The assertion made by this witness in his examination-in-chief that the appellant No.2 was being beaten by the members of the crowd near the gate of C.N.Vidyalaya and that he had apprehended the appellant No.2 and taken away the knife from his hand, is hardly challenged by the defence. It could not be even remotely suggested to this witness that he was either interested in the deceased or was on inimical terms with any of the appellants and, therefore, was out to depose falsely against the appellants. No major contradictions and/or omissions could be brought on record by the defence with reference to previous police statement of this witness. Under the circumstances, it would be in the fitness of things to accept the testimony of this witness. It may be stated that this witness stands fully corroborated by the testimony of Police Constable Radheshyam Chhotelal. The witness also stands corroborated by testimony of Police Inspector Mr.S.G.Gohil, recorded at Exh.45. Therefore,

this Court is of the opinion that the learned Judge of the trial Court did not commit any error in placing reliance on the testimony of this witness for the purpose of fastening criminal liability on the appellants.

14. The third witness whose testimony deserves to be noticed by the Court is witness Gogaji Surajmal, who is examined by the prosecution at Exh.27. The witness has stated that he was residing in House No.66/1 1132 situated at Shivnandan Nagar, Garvel Hanuman, Amraiwadi, Ahmedabad, and maintaining himself by driving the loading rickshaw. According to him, the registration number of the rickshaw, which was belonging to him, was GRR-5780. The witness has mentioned that he used to wait with the rickshaw opposite Panchkuva Darwaja for business and that normally, he was starting his business at about 10.00 a.m. The witness has mentioned that on August 27, 1993 since about 10.30 a.m. or 11.00 a.m., he was waiting with his rickshaw near Panchkuva Darwaja for business and two persons had come on scooter at about 12.30 noon asking him to come to Astodia Police Station, Raipur as he was called by deceased Ms.Geetaben. The witness has mentioned that the persons, who had come on scooter, had informed him that calves were to be loaded in his rickshaw. According to this witness, he was knowing Ms.Geetaben and, therefore, he had taken his loading rickshaw to Astodia Police Station. The witness has stated that at the said Police Station, Ms.Geetaben and

Mr.Hitesh Patel had met him. The witness has informed the Court that Hitesh Patel was working in the institution in which Ms.Geetaben was discharging duty. The witness has mentioned that on reaching Astodia Police Station, he had noticed that six calves were loaded in another loading rickshaw. According to him, he had transferred six calves in his loading rickshaw with the help of Hitesh Patel and others. The witness has stated that when he had started his rickshaw for Panjarapole, a policeman had occupied part of the driver's seat whereas Ms.Geetaben and Hitesh Patel had engaged another rickshaw. The witness has stated that he was asked to take loading rickshaw towards Panjarapole, Ambawadi, and, therefore, he had taken his loading rickshaw towards Town Hall, Ellisbridge, through Khamasa Gate. The witness has mentioned that he had halted his rickshaw near Town Hall where the policeman, who was sharing the driver's seat, had alighted and, therefore, Ms.Geetaben had disengaged her rickshaw and sat on the part of driver's seat of his rickshaw whereas Hitesh Patel had occupied loading portion of the rickshaw wherein calves were loaded. The witness has stated that from Town Hall, he had started for Panjarapole. According to this witness, on reaching Panjarapole, Ms.Geetaben had contacted a person who was present in the office whereas he in the company of Hitesh Patel had gone inside the Panjarapole to leave the cattle to the care of the institution. The witness has stated that thereafter, they had come back to the Office and taken water. The witness has stated that it was suggested

that they all should take tea and, therefore, he had taken his loading rickshaw to a road side Tea-Stall and he was followed by one Vashram as well as Ms.Geetaben and Hitesh. The witness has mentioned that they had taken tea and coffee and again started backward journey. The witness has mentioned that at that time, Ms.Geetaben was sharing part of the driver's seat whereas Hitesh was sitting in the loading portion of the rickshaw. The witness has asserted that when the rickshaw had reached bus stand situated near C.N.Vidyalaya, all of a sudden, two persons had come on scooter and intercepted his loading rickshaw by overtaking his rickshaw. The witness has stated that as his loading rickshaw was overtaken, he had no alternative but to halt the same. The witness has claimed that the person who was driving the scooter had, all of a sudden, alighted from the scooter and he was heavily built. According to him, on seeing the said person, Ms.Geetaben had also alighted from the loading rickshaw. The witness has mentioned that the person, who was heavily built, had caught the deceased all of a sudden and started inflicting blows on her. The witness has asserted that another person, who was pillion-rider, had taken out a big knife from the dickey of the scooter and he had also started inflicting knife blows on Ms.Geetaben. According to this witness, at that point of time, a person looking like a policeman had challenged the assailants and, therefore, the assailants had left Ms.Geetaben and had made an attempt to flee the place of the incident on the scooter.

According to this witness, the policeman had caught hair of one of the persons as a result of which, a scuffle had ensued between the policeman and the said person. The witness has asserted before the Court that the person, who was pillion-rider, had started running towards Ambawadi Excise Chowky and, therefore, he had also started running towards Excise Chowky to apprehend him. The witness has stated that before he could apprehend the pillion-rider, the members of the public had caught the said person and had beaten him. According to this witness, the person, who was driving the scooter and had scuffle with the policeman, was brought to Chhadavad Police Chowky. The witness has stated that he had visited Chhadavad Police Chowky and found that both the assailants were brought to Chhadavad Police Chowky. According to this witness, he had come back to Ambawadi Circle and taken his rickshaw which was lying there, and gone to Panchkuva and thereafter gone to his house in the evening. The witness has mentioned that his police statement was recorded on sixth day of the day of the incident. According to this witness, after his police statement was recorded at about 11.00 a.m., the police had visited him at his house and in the evening, he was called in the compound of Gheekanta Court where an identification parade was arranged and that he had identified the appellants as assailants of the deceased. The witness asserted that he was able to identify those persons in the Court also and had, in fact, identified both the appellants, who were present in the Court.

14.1 This witness is cross-examined in great detail. In his cross-examination, it is mentioned by him, that he was not tying watch, but the incident had taken place after 2.00 p.m. and probably before 2.30 p.m. because it was 2.00 O'clock in the clock kept at Panjarapole when he had left the Panjarapole. The witness has stated that they had spent 5 to 7 minutes in consuming tea. The witness has further stated that they had reached Panjarapole between 1.30 p.m. and 2.00 p.m. According to this witness, his loading rickshaw was used for the purpose of leaving cattle at Panjarapole earlier also and he used to leave Ms.Geetaben at her destination after leaving the cattle at Panjarapole. According to this witness, when he had gone to Astodia Police Station, the complaint of Ms.Geetaben was being reduced into writing and the time was 12-30 noon. The witness has mentioned that times mentioned by him in his police statement were stated approximately. According to this witness, after he had reached Astodia Police Station, the work of reducing the complaint of Ms.Geetaben into writing was continued for about 10 to 15 minutes. The suggestion made by the defence that the work of reducing the complaint of Ms.Geetaben into writing was over by 1.30 p.m., was not commented upon by the witness at all. According to this witness, he was not knowing whether the police statement of two others, who were present at Astodia Police Station, were recorded or not nor was he knowing whether panchnama of loading

rickshaw in which the cattle were kept was drawn nor was he knowing the time of recording the same because, according to him, he was not tying wrist watch. The suggestion made by the defence that calves were loaded in his rickshaw after drawing of panchnama was completed at Astodia Police Station is emphatically denied by him and it is asserted by him that the calves were loaded in his rickshaw as soon as he had reached Astodia Police Station. According to him, the whole procedure of loading the calves etc. was undertaken by the policeman and Ms.Geetaben and at that time, he was standing outside the Police Station. According to him, he was not knowing as to what was being reduced into writing at Astodia Police Station. The witness has mentioned that he had stayed at Astodia Police Station for about 10 minutes after reaching the same. The suggestion made by the defence that he had left Astodia Police Station at 2.30 p.m. is emphatically and assertively denied by him. According to him, the distance between Astodia and Panjarapole is about 5 Kilometers and it would hardly take 15 minutes to reach Panjarapole from Astodia in rickshaw. The witness has stated that during the traffic hours, it would take about half-an-hour to reach Panjarapole from Astodia. According to this witness, they had stayed at Panjarapole for about 15 to 20 minutes. The witness has stated that he had not received return-rent from Panjarapole because he was not entitled to charge the same. The witness has stated that he had received Rs.80/- by way of rent for bringing the calves from Astodia to

Panjarapole. The witness has mentioned that the receipt of the same was prepared by Ms.Geetaben and below the said receipt, he had signed. According to him, he had studied up to 7th Standard. The witness was shown xerox copy of the receipt signed by him and it was stated by the witness that he had not handed over the receipt to the Police because he himself had not received any receipt at all. According to this witness, at the time of incident, he was frightened, but asserted that it was wrong to suggest that because of the incident, people had started running helter-skelter. The witness has further mentioned that on seeing the incident, he was scared and because of fear, he had left the place with his loading rickshaw. The witness has stated that because of the incident, he was so scared that he had not taken out his loading rickshaw for business for sometime. The suggestion made by the defence that as he was scared, he had left his rickshaw unattended is emphatically denied by him. The defence counsel wanted to know from the witness as to who had taken deceased Ms.Geetaben to hospital and in answer to this question, he replied that probably Hitesh Patel had taken deceased Ms.Geetaben to the hospital. The witness has asserted in his cross-examination that he had no talk with Hitesh nor had he helped Hitesh when he was taking Ms.Geetaben to the hospital though Hitesh was at a distance of 10 to 15 feet away from him, at the time of incident. The defence counsel also wanted to know from this witness as to whether he had felt to remove Ms.Geetaben to

hospital and in answer to the said question, the witness replied that before he could remove Ms.Geetaben to the hospital, Hitesh Patel had taken Ms.Geetaben to the hospital in a passenger rickshaw. The suggestion made by the defence that Hitesh had removed Ms.Geetaben to hospital before he had started running to apprehend the pillion rider is denied by him. According to him, he had hardly taken about 2 to 2½ minutes in chasing the pillion-rider and coming back to the spot. The suggestion made by the defence that he had visited Chhadavad Police Chowky with his loading rickshaw, is also denied by him. According to this witness, before seven to eight months of the incident, he was knowing Ms.Geetaben. The suggestion made by the defence that Ms.Geetaben used to keep hunter was denied by him. The suggestion made by the defence that he was keeping an iron-bar in his rickshaw was also denied by him. According to him, he had not seen hunter lying at the place of incident nor had seen Hitesh with iron-bar. The witness has mentioned that he had no talk with the policeman who had arrived at the place of incident, but asserted that he had seen a policeman catching hold of hair of the person. The witness has stated that he had not gone to help the police and was not able to identify the policeman, who had caught one of the assailants by his hair. The suggestion made by the defence that the appellants, who were identified by him as assailants, were seen by him on the day of incident, is accepted by the witness. The suggestion made by the defence that the police, in

the morning of the day on which his police statement was recorded, had brought the appellants at his residence, is emphatically denied by him. The witness has mentioned that at about 4.00 p.m., he was called at Ellisbridge Police Station on the day on which his police statement was recorded. According to this witness, at that time, PI Mr.Gohil was there, but he was not knowing as to where the appellants were. The witness has mentioned that identification parade was held in presence of the Executive Magistrate. According to this witness, the Executive Magistrate was also present in the room where identification parade had taken place and about ten persons were made to stand in queue. The witness has stated that the persons who were made to stand in queue were aged about 30 to 35 years and that he had identified the appellants during the course of holding of identification parade. The cross-examiner wanted to know from the witness as to what was the colour of clothes put on by the appellants, but the witness stated that he was not remembering as to clothes of which colour were put on by the appellants at the time of identification parade. The witness has mentioned that after identification parade, he was taken to Ellisbridge Police Station. The witness has asserted that he had taken hardly about 5 minutes in identifying the appellants. According to this witness, he was not knowing as to whether the appellants had arrived earlier in point of time than ten other persons, who were summoned in the office of Executive Magistrate. The witness has mentioned that

in the office of the Executive Magistrate, he was made to sit in the office of Executive Magistrate, but he was not knowing where the Executive Magistrate was sitting. The suggestion made by the defence that the people had started running helter-skelter because of the incident, is again denied by the witness. According to this witness, he had not heard any shout for apprehending the accused. The witness has further stated that he had not seen from the rear portion of the rickshaw as to who had caused how many blows to deceased Ms.Geetaben. The suggestion made by the defence that he had left Ms.Geetaben at Panjarapole and was thereafter not in her company at all, is emphatically denied by him. The suggestion made by the defence that before recording of his testimony, he was shown the appellants by the police is also emphatically denied by him. The suggestion made by the defence that he was deposing falsely at the instance of Vishwa Hindu Parishad is also denied by him. The suggestion made by the defence that he was stating wrong time at which the incident had taken place, is also emphatically denied by him.

14.2 This is all what emerges from the testimony of witness Gogaji Surajmal. It may be stated that this witness was not knowing any of the appellants. He had no grudge against any of the appellants and, therefore, would not make any attempt to falsely implicate the appellants in such a serious case. Though the witness has been cross-examined gruelly, nothing could be

brought on record to impeach his credibility. No major contradictions and/or omissions could be brought on record with reference to his earlier police statement. The witness has narrated the incident as it had happened without making any improvements and/or embellishments. The witness stands fully corroborated by the testimony of witness Radheshyam Chhotelal recorded at Exh.21 and witness Jashuji Takhuji recorded at Exh.25. His claim that the appellants had inflicted knife blows on the deceased could hardly be challenged effectively by the defence in his lengthy cross-examination. The assertion made by the witness that he had identified both the appellants at the identification parade, which was held on the day on which his police statement was recorded, stands completely corroborated by the testimony of Executive Magistrate Mr.Jagdeesh Sunderlal Parmar examined by the prosecution at Exh.50 and PI Mr.S.G.Gohil, examined by the prosecution at Exh.45.

15. Executive Magistrate Mr.Jagdeesh Sunderlal Parmar has stated in his testimony that on September 3, 1993 at about 3.00 p.m., he had received an intimation to hold identification parade and that he had made endorsement on the same. The witness has mentioned that he had intimated to the Police Officer concerned that identification parade would be held at about 16-45 hours. The witness has mentioned that through his peon, he had requisitioned services of two panch-witness and

after knowing their particulars, they were explained as to what was to follow at the identification parade. The witness has stated that panch-witnesses were made to sit in a separate room whereas the two appellants were brought in his office at about 16-35 hours and made to sit in his room. The witness has stated that he had verified the names and addresses of the appellants to satisfy himself that identification parade was to be held with reference to the appellants. According to this witness, thereafter, the appellants were made to stand up and through his peon, services of ten persons were requisitioned, who were resembling the appellants. The witness has asserted that thereafter, the appellants were offered to change their clothes, but the said offer was declined by them. According to this witness, in all twelve persons were made to stand in queue and thereafter, he had called the person through his peon who was to identify the culprits. The witness has stated that the name of the person, who was to identify the culprits, was called out by his peon and thereupon, the said person had come. According to this witness, he had asked the said person to identify the person by catching hand and thereupon, the said person had gone near the persons, who were standing in queue, and brought out of the queue the two persons by catching their hands. According to this witness, thereafter the person, who had identified the culprits was allowed to go and drawing of panchnama was completed at about 17-25 hours.

15.1 In his cross-examination, the witness has stated that he was discharging duties as Deputy Mamlatdar & Executive Magistrate. The witness has mentioned in his cross-examination that he had held about 100 to 150 identification parades. According to him, his co-employee was one Mr.P.R.Patel and Mr.Patel was also holding the same post as that of him. According to him, on the day on which, identification parade was held, he had no cases to be heard. The witness has given full description of the room where he was sitting during the course of his cross-examination by the defence counsel. The suggestion made by the defence that the staff of Magistrate was present at the time when identification parade was held, is emphatically denied by him. The witness has mentioned that two peons were at his disposal, but he was not knowing as to which work was assigned to them. According to him, he was a staff member and, therefore was not entitled to services of a peon on personal basis. The cross-examiner wanted to know the name of the peon, who had gone to summon ten persons who were resembling to appellants and the witness has mentioned that he was not knowing the name of the said peon. The suggestion made by the defence that he had, in fact, not held any identification parade and had mentioned the facts in the panchnama at the instance of Police is emphatically denied by him.

15.2 On re-evaluation of the testimony of the Executive Magistrate, this Court finds that in the discharge of his official duties, he had held identification parade after receipt of necessary intimation from the police. His testimony further shows that he had taken all the necessary precautions, which should be taken to prevent the identifier from seeing the accused, who were to be identified. It could not be even remotely probabilized by the defence that, in fact, identification parade was not held as asserted by witness Mr.J.S.Parmar and that false facts were noted down in the panchnama at the instance of the police. The record does not show that the Executive Magistrate was knowing any of the appellants or the deceased. Therefore, he would not go to the extent of preparing a false document to oblige the police. Thus, the testimony of witness Gogaji Surajmal recorded at Exh.27 gets complete corroboration from the testimony of Executive Magistrate Mr.J.S.Parmar, recorded at Exh.50.

15.3 Further, testimony of eye-witness Gogaji Surajmal also gets corroboration from the testimony of PI Mr.Surendrasinh Gambhirsinh Gohil recorded at Exh.45. This witness has also stated that during the course of investigation, he had recorded police statement of witness Gogaji on September 3, 1993 as he was available on that day and that he had requested the Executive Magistrate, Ahmedabad, to hold identification parade to enable witness Gogaji to

identify the assailants of the deceased. The witness has mentioned that identification parade was held in the evening of the day on which, police statement of witness Gogaji was recorded. This assertion made by PI Mr.Gohil is not challenged by the defence in his cross-examination at all. Thus, the testimony of witness Gogaji also gets corroboration from the testimony of PI Mr.Gohil.

16. The plea that police statement of eye-witness Gogaji was recorded on the sixth day of the incident and as delay in recording his police statement is not explained by the prosecution, his testimony should be discarded from the consideration has no substance. The effect of delay in recording police statement of a witness on the prosecution case has been considered by the Supreme Court in catena of decisions. In **Ranbir & Others vs. State of Punjab, A.I.R. 1973 SC 1409**, the Supreme Court has ruled that question of delay in examining a witness during the investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case. What is highlighted by the Supreme Court in the said decision is that it is essential that the investigating officer should be asked specifically about the delay and the reasons therefor. According to the Supreme Court, the evidence of a witness does not become untrustworthy merely because he was examined after

delay by the Investigating Officer. In **Prithvi (Minor) vs. Mam Raj & Others, 2005 SCC (Cri.) 198,** the incident occurred on the night of August 14, 1993/August 15, 1993. The Investigating Officer recorded the statement of injured eye-witness on August 29, 1993. The Investigating Officer stated that when he arrived at the spot injured eye-witness was unable to speak except making moaning noises. The injured eye-witness was thereafter moved to hospital and despite various efforts, the Investigating Officer was not allowed to record statement of the injured eye-witness. The Supreme Court has held that unexplained delay in recording statement may render it suspect, but delay in recording statement of witness may occur due to various reasons and can have several explanations. What is ruled by the Supreme Court is that it is for the Court to assess the explanation and if satisfied, accept the statement of the witness.

16.1 Applying the principles laid down by the Supreme Court in above quoted decisions to the facts of the instant case, this Court finds that the Investigating Officer, i.e. Mr.Gohil, was not asked specifically about the delay in recording police statement of eye-witness Gogaji and the reasons therefor. The evidence of eye-witness Gogaji Surajmal recorded at Exh.27 makes it more than clear that because of gruesome and heinous murder of deceased Ms.Geetaben, he was scared and was not available for six days. This explanation is

not only plausible but acceptable because on seeing such a ghastly act, any witness is bound to be scared and frightened. Further, the record does not show that the delay is indicative and suggestive of some unfair practice by the Investigating Agency for the purpose of introducing a got-up witness to falsely support the prosecution case. As noticed earlier, witness Gogaji was not knowing any of the appellants. He had no axe to grind against any of the appellants and to implicate them falsely. The record shows that on the day of incident, he had accompanied the deceased and after leaving the cattle to the care of Panjarapole was returning with the deceased. Merely because, it could not be ascertained by the Investigating Officer that the green coloured loading rickshaw, which was found lying at the bus stand situated near C.N.Vidyalaya belonged to Gogaji Surajmal, one need not jump to a conclusion that the whole testimony of witness Gogaji is got up. The testimony of witness Gogaji, which does not suffer from any infirmity, cannot be brushed aside on the ground that his police statement was recorded on sixth day of the incident. Delay in recording his police statement stands satisfactorily explained by him and the delay has no adverse effect on the prosecution case at all. The testimony of this witness cannot be rejected on the ground of delay in recording his police statement more particularly when he has withstood the test of cross-examination. Therefore, the plea based on delay in recording police statement of witness Gogaji Surajmal, has no

substance and is hereby rejected.

17. The contention that the incident had not taken place at about 2.30 p.m. on the date of incident, but had taken place after 3.30 p.m., and as the prosecution has suppressed the genesis of the incident, the appellants should be acquitted, is devoid of merits. This plea is based on the panchnama, which was prepared by the Police Officer of Astodia Police Station pursuant to complaint lodged by deceased Ms.Geetaben against two persons namely, Rajubhai Shivabhai Raval and Arvindkumar Amrutlal Patel, for commission of offences punishable under Sections 378 and 335(1) of the Bombay Provincial Municipal Corporations Act, 1949 after it was noticed that six calves were being removed to abattoir for slaughtering. It may be mentioned that during the course of recording of statement under Section 313 of the Code, the appellant No.1 had produced certain documents for consideration of the Court and one of the documents is panchnama prepared pursuant to complaint of Ms.Geetaben, which was commenced at 13.50 hours and completed at 14.20 hours. On the basis of this panchnama, it was contended that after 2.20 p.m. on the day of incident, Ms.Geetaben in the company of others had left Astodia for Panjarapole where the cattle were left to the care of Panjarapole from where she was returning and, therefore, the incident could not have taken place at about 2.30 p.m. as claimed by the prosecution, but must have taken place after

2.30 p.m., which, in turn, indicates that the genesis of the prosecution has been suppressed by the prosecution.

17.1 The first question, which is to be considered, is whether the panchnama prepared with reference to II-C.R.No.297 of 1993 registered with Astodia Police Station for commission of offences punishable under Sections 378 and 335(1) of the Bombay Provincial Municipal Corporations Act, 1949 is admissible in the instant proceedings. It may be stated that what was produced before the Court was true copy of panchnama and not certified copy of the panchnama. As per Clause (f) of Section 65 of the Evidence Act, secondary evidence may be given of the existence, condition, or contents of a document when the original is a document of which certified copy is permitted by this Act, or by any other law in force in India to be given in evidence. Section 76 of the Evidence Act deals with certified copies of public documents and reads as under:

> "***Certified copies of public documents.***
>
> ***76.*** *Every public officer having the custody of a public document, which any person has right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, when ever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.*
>
> *Explanation: Any officer who, by the ordinary*

course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section."

The record does not show that the document indicating panchnama prepared pursuant to the complaint of Ms.Geetaben is a certified copy within the meaning of Section 76 of the Act. There is no endorsement by any competent officer that the document is copy, which was compared with original panchnama and thereafter, was certified to be true copy of the said document. As conditions set out in Sections 65 and 76 of the Evidence Act are not satisfied, the document cannot be read in evidence in the instant proceedings. Further, to prove this document, no attempt was made by the defence at all. A bare reading of the panchnama, which was produced by the appellant No.1 during the course of recording of his statement under Section 313 of the Code, indicates that panchnama was prepared in presence of two panchas; (1) Johnbhai Valjibhai Christian and (2) Nitin Laljibhai Mistri and it was drawn by First Grade Jamadar of Astodia Police Station. The appellants did not examine any of the panch witnesses nor the First Grade Jamadar of Astodia Police Station to prove the contents of the panchnama, which was drawn pursuant to the complaint lodged by Ms.Geetaben.

17.2 Further, even if it is assumed for the sake of argument that the panchnama prepared between 13.50 hours and

14.20 hours on August 27, 1993 pursuant to the complaint of deceased Ms.Geetaben is admissible in evidence, it nowhere indicates that at the time of drawing of panchnama, Ms.Geetaben was physically present at Astodia Police Station. The assertion made by all the three eye-witnesses, who are found to be reliable by this Court makes it evident that the incident had taken place between 2.25 hours and 2.30 hours on August 27, 1993. As noticed earlier, eye-witness Gogaji Surajmal whose testimony is recored at Exh.27, has, in terms, asserted before the Court that he had stayed at Astodia Police Station only for 10 minutes and had left immediately for Panjarapole in the company of Ms.Geetaben. It is relevant to notice that the suggestion made by the defence that the calves were loaded in his rickshaw after the drawing of panchnama pursuant to the complaint of Ms.Geetaben was over, is emphatically denied by witness Gogaji. The suggestion made by the defence to him that he had left Astodia Police Station at about 2.30 p.m. is also emphatically denied by him. Further, the testimony of witness Saburbhai Gambhirbhai, recorded at Exh.42, makes it more than clear that at the relevant time, he was discharging duties as PSO of Ellisbridge Police Station and his duty hours were from 2.00 p.m. to 8.00 p.m. According to him, when he was on his duty, at 15.25 hours, a telephonic message/verdhi was received by him from Police Constable Jethabhai, who was posted at V.S.Hospital and that he had noted down the said verdhi in verdhi book. It may be mentioned that the message conveyed to

this witness was that the Medical Officer of the hospital had declared that the deceased was brought dead. The witness has mentioned before the Court that after receiving the information, he had conveyed the same to PI Mr.Gohil of Ellisbridge Police Station, who was available at his residence. The witness has mentioned that on the instructions of PI Mr.Gohil, he had requested PSI Mr.Parmar to go to V.S.Hospital to hold inquest on the dead body of the deceased. According to him, verdhi-book was not available in spite of best search made by him. He was shown a document, which was signed by him. The said document indicates that on the basis of instructions received from CMO, Dr.Rakesh Patel of V.S.Hospital, Jamadar Jethabhai, who was posted at V.S.Hospital, had informed witness Saburbhai that the deceased, who had sustained several incised wounds, was declared brought dead at about 14-55 hours on August 27, 1993. It means that the incident must have taken place as asserted by the prosecution between 2.25 hours and 2.30 hours and not after 3-30 hours as claimed by the defence. The record does not indicate in any manner that the incident had taken place after 3.30 p.m. and, therefore, the plea that the genesis of the incident is suppressed by the prosecution and, therefore, the prosecution case should be thrown over board, cannot be accepted.

18. The plea that neither Hitesh Patel, who was with deceased Ms.Geetaben at the time of incident and who had

removed the deceased to hospital and whose bloodstained clothes were seized under a panchnama, is examined; nor PSI Mr.Parmar, who had gone to the hospital to hold inquest on dead body of deceased Ms.Geetaben is examined; nor Constable Jethabhai who had sent the message to Police Constable Sabursinh Gambhirsinh, who was PSO of Ellisbridge Police Station, is examined; nor panch-witnesses, who had seen as to how identification parade was held, are examined; nor SRP Jawan, who had aimed his loaded rifle at the appellant No.1, is examined and, therefore, the prosecution case should be disbelieved for not examining material witnesses after drawing adverse inference as contemplated by Section 114 of the Evidence Act, has no merits.

18.1 Section 134 of the Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact. The law enshrined in Section 134 of the Evidence Act does not require any particular number of witnesses to prove a certain fact. Under Section 3, a fact will be presumed to have been proved when after considering the matter before it, the Court either believes it to exist or considers its existence to be so probable that a prudent man under the circumstances of a particular case believes that such fact existed. So in ordinary course of law, the facts to be proved, should be proved in a manner which on objective basis satisfies the Court as in case of an ordinary prudent man of

the existence of fact. The underlying object of Section 134 is that it is not the number of witnesses nor the quantity of evidence adduced by the prosecution that counts, but it is the quality that counts. Further, the prosecution has always discretion to give up examination of witnesses to avoid duplication of evidence. A Public Prosecutor may give up witnesses to avert proliferation of evidence which could save much time of the Court unless examination of such a witness would achieve some material use. If examination of a witness would only have helped in duplication of the same category of evidence as the other eye-witnesses the Public Prosecutor cannot be blamed for adopting the course of not examining him. By this time, it is well settled that if an accused thinks that particular person's evidence would help the defence, it is open to the accused to examine him as a defence witness. The prosecution case has been completely and satisfactorily unfolded and established by examination of the three eye-witnesses and other Police Officers, namely; (1) Saburbhai Gambhirbhai; (2) Investigating Officer Mr.Gohil; and (3) Executive Magistrate Mr.Parmar and, therefore, it was not necessary for the learned Public Prosecutor conducting the trial to duplicate the evidence. At no point of time, the defence had made request to the trial Court to permit the appellants to examine the witnesses, who were not examined by the prosecution, nor it is the case of the defence that any such request was made and was arbitrarily turned down by the

learned Judge of the trial Court. As the prosecution case has been completely unfolded and proved beyond pale of doubt by the witnesses examined in this case, non-examination of certain witnesses whose names have been mentioned by the learned counsel of the appellants, cannot be treated as having adverse effect on prosecution case nor the prosecution case is liable to be doubted because of non-examination of certain witnesses.

19. The plea that the incident had taken place between 3.00 p.m. and 3.30 p.m. on August 27, 1993, but Police Constable Radheshyam Chhotelal and Police Jamadar Jashuji Takhuji were projected to be eye-witnesses to help the case of the prosecution, cannot be accepted. This Court has earlier held that the incident had not taken place between 3.00 p.m. and 3.30 p.m. on the day of incident, but had taken place between 2.25 p.m. and 2.30 p.m.. Further, the claim of Police Constable Radheshyam Chhotelal that an attempt was made by the appellants to abscond on the scooter which was being driven by the appellants and that the scooter had hit his right leg as a result of which, he had sustained minor injuries, stands fully corroborated by medical evidence of Dr.Chandana. Before Dr.Chandana also, it was mentioned by Police Constable Chhotelal Radheshyam that he had sustained injury in a vehicular accident. The testimony of witness Radheshyam and that of Police Jamadar Jashuji Takhuji is found to be cogent, consistent as well as trustworthy, and it is wrong to contend

that they were projected to be eye-witnesses to help the prosecution case.

20. The plea that the Investigating Officer has stated that the bloodstained knife was found lying on the ground which was picked up whereas Police Constable Radheshyam has stated that he had taken bloodstained knife from the hand of the appellant No.1 and in view of this inconsistency, the testimony of witness Radheshyam should be disbelieved, has no substance. In fact, the panchnama of place of incident, which is produced by the prosecution at Exh.34 does not mention at all that bloodstained knife, which was in the hand of the appellant No.1 was found lying on the ground and that the same was picked up from the ground. Therefore, a stray statement made by the Investigating Officer during his cross-examination that the bloodstained knife, which was lying on the ground, was picked up, would not impeach credibility of witness Radheshyam nor assertion made by Police Constable Radheshyam that he had taken bloodstained knife from the hand of the appellant No.1 stands whittled down. In the complaint lodged by Police Constable Radheshyam, it is specifically mentioned that when the appellant No.1 had raised his hands at the time when loaded rifle was aimed at him by SRP Jawan, he had taken away bloodstained knife, which was in the hand of the appellant No.1. It is relevant to notice that the complaint was lodged first in point of time and, thereafter, the panchnama of place

of incident was drawn between 18-35 hours and 19-35 hours on August 27, 1993. It is nobody's case that for a pretty long time, the bloodstained knife was lying on the spot and, therefore, the statement made by PI Mr.Gohil that bloodstained knife, which was found lying on the ground at the place of the incident, was picked up, does not inspire confidence of this Court. The testimony of eye-witness Police Constable Radheshyam is consistent and stands corroborated by other contemporary record prepared and the case of the prosecution cannot be disbelieved on the ground that the knife was not recovered from the hand of the appellant No.1, but was recovered when it was found lying on the spot.

21. At this stage, it would be appropriate to refer to another incriminating circumstance, which is brought on record of the case by the prosecution. It is FSL report produced at Exh.48 on the record of the case. The testimony of the Investigating Officer, i.e. PI Mr.Gohil, indicates that the incriminating articles seized during the course of investigation were sent to FSL for analysis. The analysis report indicates that the same group of blood as that of the deceased was found on the weapons seized from both the appellants and their clothes. As per FSL report, the blood group of the deceased was 'B' and the blood group found on the two weapons namely two big knives and clothes put on by the appellants, was also 'B'. The find of same group of blood as

that of the deceased on the weapons recovered from the appellants and on their clothes would indicate that they were in close proximity of deceased Ms.Geetaben when she was fatally wounded. This circumstance has been explained by the learned Judge of the trial Court to the appellants while recording their further statements under Section 313 of the Code, but no explanation worth the name could be offered by any of the appellants as to how the same group of blood as that of the deceased was found on the weapons recovered from them and on their clothes. This circumstance lends corroboration to the assertion of the eye-witnesses that the appellants had caused injuries to the deceased.

22. The plea that the blood sample of the two appellants were not taken in presence of panch-witnesses and, therefore, the report of FSL should be discarded is merely stated to be rejected. It is relevant to notice that both the appellants were apprehended on the spot and brought to Chhadavad Police Station. The weapons recovered from them were bloodstained. So also their clothes were found to be bloodstained. The clothes put on by the appellants and the weapons recovered from them were immediately seized under a panchnama, which is produced by the prosecution on the record of the case at Exh.38. This is not a case where seizure of the weapons and bloodstained clothes was effected later on after sometime. The plea that possibility of blood of the appellants having been sprinkled on

the weapons produced by the prosecution and on the clothes of the appellants cannot be accepted at all because here the appellants were arrested, their weapons were recovered and the clothes were seized immediately after the incident. It could not be even remotely suggested by the defence to any of the fourteen witnesses examined by the prosecution that after collecting the blood samples of the appellants, the blood was sprinkled over the weapons allegedly recovered from the appellants and the clothes of the appellants and, therefore, the same group of blood as that of the deceased was found on those articles. A far-fetched plea, which has no factual basis, cannot be accepted and it will have to be held that the find of the same group of blood as that of the deceased on the weapons recovered from the appellants as well as on their clothes makes it very clear that the appellants were in close proximity of the deceased when she was fatally wounded. The said circumstance will have to be viewed in the light of the eye-witness account of the incident given by the three eye-witnesses and if so taken, establishes the complicity of the appellants in the incident fully.

23. The contention that as conspiracy envisaged by Section 120B IPC is not held to be proved, the appellants could not have been convicted for commission of offence punishable under Section 302 IPC with the aid of Section 34 IPC in absence of charge under Section 34 IPC, has also no merits. Section

215 of the Code provides that no error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars, shall be regarded at any stage of the case material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Section 464, subsection (1) of the Code provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

23.1 In **B.N.Srikaniah vs. State of Mysore, A.I.R. 1958 SC 672**, the Supreme Court has explained that the object of a charge is to warn an accused person of the case he is to answer and it cannot be treated as if it was a part of a ceremonial. What is ruled by the Supreme Court is that omission to mention Section 34 of the Penal Code in the charge cannot affect the case unless prejudice is shown to have resulted in consequence thereof. In **Ramji Singh & Another vs. State of Bihar, A.I.R 2001 SCC 3853**, charge was framed against the accused only under Section 302 IPC and there was absence of charge under Section 34 IPC. The Supreme Court has held that the accused can be convicted under Section 302 IPC read with Section 34 IPC more

so when no prejudice is caused to any of the accused because of non-framing of charge under Section 34 IPC. Again, in **Mangu Khan & Others vs. State of Rajsthan, (2005) 10 SCC 374**, there was acquittal of the accused persons of charge under Section 302 IPC *simpliciter*. The High Court convicted the appellants and others under Section 302/34 IPC. The legality of the same was considered by the Supreme Court. It was found that the trial Court had convicted five persons, *inter alia,* under Sections 302/149. While acquitting two of them, three accused persons were found to have given repeated blows with *lathi, farsi* and *tanchia* by the High Court causing death of the two persons. It was not possible to identify and ascribe a particular injury to a particular accused and to pinpoint the person who dealt the fatal blows as a result of which the conviction of the appellants under Section 302 IPC *simpliciter* was not possible. However, the High Court having found that three accused had common intention to cause the fatal injuries to the deceased which was evident from their waiting with arms early in the morning convicted them under Sections 302/34 IPC. The Supreme Court after review of the law on the point has held that there was nothing illegal in convicting the accused persons under Section 302 with the aid of Section 34 IPC. In **Karnam Ram Narsaiah & Ors. vs. State of A.P., (2005) 10 SCC 629**, the Supreme Court has ruled that conviction in the absence of a charge under Section 34 IPC can be sustained if the facts and circumstances show that common intention existed

and the accused acted with such intention.

23.2 Section 34 IPC is only a rule of evidence and does not create a substantive offence. It means that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done individually. It merely enunciates a principle of joint liability for criminal act done in furtherance of common intention of the offenders. In order to convict persons vicariously liable under Section 34 IPC, it is not necessary to prove that each and every one of them had indulged in overt acts, but there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of common intention.

23.3 The evidence on record indicates that when the rickshaw in which deceased Ms.Geetaben was proceeding towards Ambawadi Circle, both the appellants had come on scooter, which was being driven by the appellant No.1 and had intercepted the loading rickshaw. The evidence further shows that as soon as the loading rickshaw was made to halt, Ms.Geetaben had alighted from the rickshaw and started running for her life, but the appellant No.1 had chased her with knife and after overtaking her at a short distance, had started inflicting injuries on her. The evidence further establishes that the appellant No.2, who was a pillion-rider, had also taken out a big knife lying in the dickey of the scooter and started inflicting

indiscriminate blows on the deceased. The weapons used by the appellants and their clothes were found to be bloodstained. The evidence of Police Constable Radheshyam would also show that both the appellants had made an attempt to run away from the place of the incident on the scooter, which was being driven by the appellant No.1, but he had foiled the said attempt by catching hair of the appellant No.1. Thus, the appellants, who were armed with the dangerous weapons, had chased Ms.Geetaben; come together on scooter; assaulted and inflicted blows on her indiscriminately, and had made an attempt to flee together. These circumstances would establish that there was simultaneous consensus amongst both the appellants. It is true that the prosecution could not lead evidence to establish that which particular injury was caused by whom. However, one cannot forget the fact that as per the medical evidence the deceased had sustained as many as nineteen serious injuries including chop wounds, incised wounds, stab wounds which, in turn, makes acceptable the case of the prosecution that the deceased was assaulted by the two appellants. There is no manner of doubt that both the appellants had shared the common intention of each other. They had intercepted the rickshaw in which the deceased was driving and assaulted her fatally. Under the circumstances, the learned Judge of the trial Court was justified in invoking Section 34 IPC to the facts of the case. The learned counsel of the appellants could not point out to the Court as to which prejudice was suffered by the appellants

when they came to be convicted under Section 302 with the aid of Section 34 IPC in absence of charge under Section 34 IPC. All the proved circumstances were explained to the appellants when their further statements were recorded under Section 313 of the Code. They were made aware of the common intention which they had shared with each other. In view of this state of affairs, it is difficult for the appellate Court to come to the conclusion that any prejudice is suffered by the appellants because of their conviction under Section 302 read with Section 34 IPC. It is not the case of the appellants or any one of them that proper defence could not be pleaded because of invocation of Section 34 IPC to the facts of the case nor it is the case of the appellants that the defence pleaded by them after invocation of Section 34 IPC is not considered by the trial Court. As the appellants have failed to establish that they have suffered any prejudice, the plea based on absence of charge under Section 34 IPC cannot be upheld and is hereby rejected.

24. These were the only points which were urged by the learned counsel of the appellants in support of the appeal. This is a case wherein the two appellants were apprehended on the spot with bloodstained weapons and bloodstained clothes. When an accused is apprehended on the spot, a Court of law would be justified in drawing certain legal conclusions. The evidence of the three eye-witnesses coupled with arrest of the

appellants on the very spot of offence and prompt lodging of the First Information Report, leaves no doubt that the appellants were the persons, who committed gruesome murder of deceased Ms.Geetaben. The fact that the appellants were apprehended on the spot with bloodstained weapons and clothes rules out false implication of the appellants in the case nor identity of appellants as perpetrators of crime is in doubt. The fact that the appellants were apprehended on the spot could hardly be disputed by the appellants. Their apprehension on the very spot of the offence rules out their substitution in place of the real culprits. Thus, the prosecution case, which stands fully established by the eye-witness account narrated by the three eye-witnesses, is rightly accepted by the trial Court. The learned counsel of the appellants has failed to persuade this Court to take a view different than the one taken by the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses. Thus, Criminal Appeal No.575 of 1997 has no substance and is liable to be dismissed.

25. Coming to Criminal Appeal No.525 of 1997 filed by the State Government under Section 377 of the Code wherein it is urged that capital punishment should be imposed on the appellants for committing gruesome murder of deceased Ms.Geetaben, this Court finds that by this time, the appellants have undergone major part of punishment imposed on them. This is not a case wherein the Court is called upon to confirm death

sentence imposed on the appellants by the trial Court, but after a lapse of long time, this Court is called upon to impose death sentence on the appellants as they had committed gruesome and heinous crime of murder of Ms.Geetaben on August 27, 1993. As explained by the Supreme Court in catena of decisions, the Court has to take into consideration aggravating and mitigating circumstances appearing from the record of the case before deciding to impose capital punishment on the convict. One of the mitigating circumstances enumerated by the Supreme Court is age of the accused. The record shows that at the time of commission of offence on August 27, 1993, the appellant No.1 was aged 24 years whereas the appellant No.2 was aged 20 years. Meaning thereby, the accused were young at the time of incident. There is nothing on record to establish that the appellants would commit criminal acts of violence as would constitute a continuing threat to the society nor anything is brought on record of the case by the State that there is no probability that the appellants cannot be reformed or rehabilitated. Though the gruesome murder of deceased Ms.Geetaben can never be justified, the statement made by the Investigating Officer that his investigation revealed that fifteen days prior to the day of incident, the deceased had beaten the appellant No.1 with a hunter. The record shows that on the day of the incident, six calves, which were being removed to abattoir for slaughtering belonging to the appellant No.1, were rescued and handed over to Panjarapole for safe

custody. Thus, there is no manner of doubt that the appellant No.1 must have been under great mental stress before committing the crime. On the facts and in the circumstances of the case, this Court is of the opinion that no case is made out by the State Government to impose capital punishment on any of the appellants. For not imposing the capital punishment on the appellants, the learned Judge has recorded cogent reasons in the operative part of the judgment with which this Court concurs. Therefore, Criminal Appeal No.525 of 1997 filed for enhancement of sentence under Section 377 of the Code is also liable to be dismissed.

26. Coming to Criminal Appeal No.526 of 1997, this Court finds that the appellants have been acquitted of the offence, which is punishable under Section 135(1) of the Act. The condition precedent for conviction under Section 135(1) of the Act is promulgation of notification by the competent authority under Section 37(1) of the Act. The prosecution had produced a copy of notification dated June 28, 1993 issued by the Commissioner of Police, Ahmedabad City, with list at Exh.12 and the learned Judge has exhibited the said notification at Exh.44. However, along with list Exh.12, about fifteen documents were sought to be produced by the prosecution in support of its case against the appellants and others. Mark 12/10, was the notification, which was issued under Section 37(1) of the Act. But it was not admitted by the defence at all

and, therefore, it was necessary for the prosecution to prove the same by examining the concerned officer from the Office of Commissioner of Police, Ahmedabad City. The record does not indicate that any one was examined by the prosecution from the office of Commissioner of Police, Ahmedabad City, to prove the notification issued by the Commissioner of Police, Ahmedabad City under Section 37(1) of the Act and, therefore, this Court is of the opinion that the learned Judge was justified in acquitting the appellants for commission of offence punishable under Section 135(1) of the Act. The reasons for acquitting the appellants under Section 135(1) of the Act are to be found in paragraph 23 of the impugned judgment with which this Court fully concurs. Therefore, Criminal Appeal No.526 of 1997 filed under Section 378 of the Code wherein acquittal of the appellants under Section 135(1) of the Act is challenged, is also liable to be dismissed.

For the foregoing reasons, Criminal Appeal Nos.575 of 1997, 525 of 1997 and 526 of 1997 fail and are dismissed. Muddamal be disposed of in terms of the directions given by the learned Judge of the trial Court in the impugned judgment.

[J.M.PANCHAL, J.]

[J.R.VORA, J.]

Rajendra